IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 512 of 2005
In
SPECIAL CIVIL APPLICATION No. 955 of 2005

with

LETTERS PATENT Appeal Nos.513 and 471 of 2005 and 2634 of 2004

with

SPECIAL CIVIL APPLICATION Nos 22755, 22731, 22962, 22965, 22989, 23677, 12236, 23836, 24258, 24259, 20825, 23039, 16104, 23514 of 2005 and 352 and 260 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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TORRENT POWER AEC LTD. - Appellant(s)
Versus
GAYATRI INTERMEDIATES PVT LTD - Respondent(s)

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Appearance :
M/s. TUSHAR MEHTA, BM VAISHNAV, YM THAKKAR, HARIN RAVAL with MAYUR RAJGURU, BK DAMANI and Ms SUDHA GANGWAR and KRUTI SHAH for Petitioner(s)

MR MIHIR THAKORE Sr Advocate with MR PRAFUL THAKKAR, Mr KB Pujara, Ms. Lilu Bhaya, Ms Mayaben Desai for Mr MD Pandya and Mr SN SINHA for AEC/GEB (Licensees)

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 13/04/2006
COMMON CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This group of appeals and writ petitions involve important questions relating to interpretation of the provisions of Sections 126 and 127 as well as Sections 50, 135 and 154 of the Electricity Act, 2003 and more particularly about assessment to be made by the distribution licensee in cases of theft of electricity.

Those who wish to go to our conclusions straightaway may turn to paras 21 and 22 at the end without wading through the bulk of the judgment. The rest may join us in meandering through the statutory provisions and case law for enjoying the analytical journey to the destination.

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2. While Letters Patent Appeals are directed against the common judgment and order dated 10.3.2005 of a learned Single Judge of this Court (Coram: Hon'ble Mr Justice Jayant Patel), the Special Civil Applications have been ordered to be heard with the group of appeals pursuant to the order of reference made by another learned Single Judge of this Court (Coram: Hon'ble Mr Justice MR Shah). Apart from the difference of opinion (noticed in the order of reference and set out in para 6 hereinafter) between the view taken by Hon'ble Mr Justice Jayant Patel in the above judgment dated **10.3.2005** and the view taken by another learned Single Judge of this Court (Coram: Hon'ble Mr Justice DN Patel) in judgments dated **10.9.2004** in SCA Nos. 10007 and 10008 of 2004 in the case of Leenaben Soni vs. AEC Ltd., 2005 (1) GLR 247 and dated **15.10.2004** in the case of AEC Ltd. vs. Ramesh D Devnani, 2005 (2) GLR 1202, it also appears that the same controversy came to be considered by still two other learned Single Judges of this Court - Hon'ble Mr Justice AL Dave while delivering judgment dated **20.10.2005** in Appeal from Order No.332 of 2005 and Hon'ble Mr Justice Ravi R. Tripathi while giving verdict dated **30.6.2004** in Appeal From Order No. 197 of 2004.

Legislative History

3. Prior to the enactment of the Electricity Act, 2003 (hereinafter referred to as the “new Act” or “the 2003 Act”), while Sections 39 to 50 of the Indian Electricity Act, 1910 (hereinafter referred to as “the 1910 Act”) provided for offences and penalties in prosecutions to be launched at the instance of the Government, State Electricity Board or an Electricity Inspector, neither the 1910 Act nor the Electricity (Supply) Act, 1948 (hereinafter referred to as “the 1948 Act”) contained any direct or specific provision indicating as to how the authority or the licensee distributing electricity may make assessment of electricity charges in cases of theft of electricity or unauthorized use of electricity. Section 26(6) of the 1910 Act merely provided that where there was a difference or dispute about correctness of the meter recording consumption of electricity, the meter was required to be referred to the Electrical Inspector, an officer of the State Government, for his decision. In case the meter was found to be not correctly recording electricity supply, the Electrical Inspector was to estimate the electricity supplied during such time not exceeding six months when the meter was, in his opinion, not correct. It was held in several cases including the case of Hyderabad Vanaspathi Ltd. 1998 (4) SCC 470 that Section 26(6) only related to dispute about a defect in the meter and was not applicable to cases of malpractice and theft of electricity. Under Section 21(2) of the 1910 Act, a licensee and under

Section 49 of the 1948 Act, the GEB (while distributing electricity to persons other than licensee) was empowered to frame terms and conditions for supply of electricity.

3.1 The Gujarat Electricity Board and the Ahmedabad Electricity Company, the two distribution licensees involved in this group, had framed their respective terms and conditions providing the formulae as to how the Board/the licensee was to charge consumers for theft of electricity and also for malpractices and providing an aggrieved consumer with the remedy of filing an appeal against the supplementary bill for recovering the amounts in theft cases. Such appeal would lie before the Appellate Committee of the GEB/AEC, as the case may be.

3.2 In exercise of the powers conferred by Section 49 of the Electricity (Supply) Act, 1948, the Gujarat Electricity Board had framed “the Conditions and Misc. Charges for Supply of Electrical Energy” containing detailed provisions, inter alia, for assessment in cases of malpractice and theft of energy. Condition 33(A) defined “malpractice” as contravention by the consumer of any provision of the 1910 Act, the 1948 Act or the Rules framed thereunder and contravention of the Conditions and Miscellaneous Charges for Supply of Electrical Energy and, in particular, including the following cases :-

"(a) The supply of electricity by a consumer to any other person whose supply has been disconnected by the Board for any reason.

(b) Exceeding the contracted load by a consumer without the specific permission of the Board.

(c) Unauthorised addition, alteration and/or extension to the consumer's electrical installation without the permission of the Board.

(d) Using supply by a consumer form the service which has been disconnected by the Board for any reason.

(e) Supply of energy to any other person without the permission of the Board."

Condition 33(B) defined "theft of energy" as under :-

"Any consumer who dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code and the existence of artificial means for such abstraction shall be prima facie evidence for such dishonest abstraction."

Condition 34 provided for payment for energy dishonestly used or abstracted or maliciously wasted or diverted in the manner specified therein. The condition also provided for remedy of review by the appellate authority on the appellant depositing 30% of the amount of the disputed bill out of which 15% was to be deposited first whereupon reconnection would be granted and another 15% of the amount of supplementary bill was to be paid within 30 days of

reconnection and the appeal was to be heard thereafter. This concession was, however, not to be given to a consumer who was found to have committed theft on second or subsequent occasion. Detailed formulae were prescribed for assessment in theft cases depending on whether the consumer was a High Tension consumer or a Low Tension consumer, and also depending on categories such as industrial, residential and also depending on the product being manufactured etc..

3.3 Similarly, the AEC (now called Torrent Power Ahmedabad Electricity Co. Ltd.) had framed "Conditions of Supply and Miscellaneous Charges" under Section 21(2) of the 1910 Act. Condition No. 22 thereof defined "malpractice" more or less in the same terms as condition 33(A) of GEB Conditions of Supply. Condition 23 of the AEC Conditions referred to theft of energy in terms of the relevant provisions of the 1910 Act. Part II of the conditions containing detailed provisions for assessment of charges also provided for appeal against assessment before the appellate authority (an officer not below the rank of a Senior Engineer/Deputy Manager). The appellant was, however, required to deposit 60% of the disputed bill amount for reconnection of electricity supply during pendency of the appeal; otherwise to deposit 20% of the disputed bill amount for the purpose of maintainability of the appeal.

Electricity Act, 2003 – Statutory provisions

4. When the Electricity Act, 2003 came to be enacted by Parliament, as per Section 185(1) thereof, save as otherwise provided in the said Act, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 came to be repealed.

To appreciate the controversy, it is necessary to consider the scheme of the Act. The Electricity Act, 2003 has been enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interests of consumer and supply of electricity to all areas, rationalization of electricity tariff, ... constitution of Regulatory Commission ... ... and for matters connected therewith or incidental thereto. All the provisions of the Act except Section 121 were brought into force on 10th June 2003 as per the Government of India notification dated 10th June 2003 published in the Gazette of the same date. As far as the State of Gujarat is concerned, the provisions were brought into force with effect from 10th December 2003 (vide the notification dated 10.7.2003 issued by the Government of Gujarat in exercise of the powers under Section 172(d) of the Act.).

Part III contains provisions relating to generation of electricity, Part IV contains provisions relating to licensing, Section 14 empowers the Appropriate Commission to grant a license to any person, inter alia, to distribute electricity as a distribution licensee or to undertake trading in electricity as an electricity trader in any area as may be specified in the license. A person already engaged in the business of transmission or supply of electricity under the repealed laws shall be deemed to be a licensee under this Act subject to other provisions of the Act. [The Gujarat Electricity Board succeeded by separate regional Companies in the State of Gujarat and the Ahmedabad Electricity Co. Ltd. now called “Torrent Power AEC Ltd.” are accordingly deemed to be distribution licensees under the Act].

5. It is now necessary to refer to the following specific provisions of the new Act :-

5.1 **In part XII of the new Act** dealing with investigation and enforcement, Section 126(1) provides that, if on an inspection of any place or premises or after inspection of the equipments, ... devices found connected or used, or after inspection of the records maintained by any person, “the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable

by such person or by any other person benefited by such use". Explanation to Section 126 contains the following definitions :-

> (a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;
>
> (b) "unauthorised use of electricity" means **the usage of electricity** -
>
> (i) by any artificial means; or
>
> (ii) by a means not authorised by the concerned person or authority or licensee; or
>
> (iii) **through a tampered meter**; or
>
> (iv) for the purpose other than for which the usage of electricity was authorised."

Sub-section (6) of Section 126 provides that the **assessment under this section shall be made at a rate equal to one-and-half times the tariff applicable** for the relevant category of services specified in sub-section (5) as under:-

Category of services	**Presumption regarding the period of unauthorised use**
Domestic and agricultural services	3 months preceding the date of inspection

All other categories of services	**6 months**	preceding the date of inspection

Sub-sections (2) to (4) of Section 126 lay down the procedure for making the assessment, which broadly speaking, provides for compliance with the principles of natural justice by requiring the assessing officer to serve the order of provisional assessment upon the person in occupation or possession or in charge of the place or premises where electricity is supplied and giving a right to such person to file objections against the provisional assessment and thereafter a reasonable opportunity of hearing is to be afforded to such person before passing the final order of assessment of electricity charges payable by such person.

Section 127 enables any person aggrieved by the final order under Section 126 to prefer an appeal within thirty days before an appellate authority to be prescribed, but no such appeal shall be entertained unless 1/3rd of the assessed amount is deposited with the licensee. The order of the appellate authority shall be final. The defaulting consumer is also liable to pay interest at the rate of 16% per annum compounded every six months.

5.2 Part XIV of the new Act contains provisions relating to offences and penalties and also ouster of jurisdiction of Civil Court.

Section 135(1)(b) provides that -

whoever **dishonestly -**

(a) ... ...

(b) **tampers** the meter, installs or **uses a tampered meter**, or uses any device or method which interferes with the proper or accurate meter of electricity or otherwise does an act whereby electricity is stolen or wasted,

(c) ... ...

so as to abstract or consume or use electricity shall be punishable with **imprisonment upto three years** or with fine or with both and also provides that **the fine shall not be less than three times the financial gain on account of such theft of electricity**. In case of second/subsequent conviction, more stringent penalties/sentences are provided including fine of not less than six times the financial gain.

The second proviso also raises a presumption against the consumer that if any artificial means or means not authorised by the Board or licensee exist for the abstraction, consumption or use of electricity by the consumer, **it shall be presumed**, until the contrary is proved, that any abstraction, consumption or use of electricity has been **dishonestly** caused by such consumer. **Clauses (a) and (c) of sub-section (1) of Section 135 enumerate the other cases of theft of electricity with the same punitive consequences** and read as under :-

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity.

Section 145 of the Act ousts the jurisdiction of the Civil Court to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in Section 126 or an appellate authority referred to in Section 127 or the adjudicating officer appointed under this Act is empowered by or under the Act to determine and no injunction shall be granted by any court or any other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

[Section 143 read with Sections 29, 33 and 43 require the distribution licensee and generating Company to comply with certain directions in the matter of transmission and supply of electricity. Failure to comply with those directions shall result into imposition of penalty upon the licensee upon adjudication by a Member of the Appropriate Commission appointed as an adjudicating officer under Section 143 of the Act. We are not concerned with this adjudication].

Section 151 provides that no Court shall take cognizance of an offence punishable under the Act except upon a written complaint by the Government, the Commission, their authorized officer or the licensee. Section 152 makes the offence of theft of electricity punishable under the Act as compoundable, but compounding shall be allowed only once for any person or consumer.

5.3 Part XV of the Act contains provisions for constitution, powers and procedure of Special Courts.

Section 153 empowers the State Government to constitute Special Courts for the purposes of providing **speedy trial of offences** referred to in Sections 135 to 139. A Special Court consists of a single Judge who shall be appointed by the State Government with the concurrence of the High Court and he shall have been **an Additional District & Sessions Judge** before his appointment as a Judge of the Special Court.

Section 154 provides that the offences punishable under Sections 135 to 139 of the Act shall be triable only by the Special Court within whose jurisdiction such offence has been committed. The offence is to be tried in a summary way. Sub-section (5) of Section 154 also empowers the Special Court to determine the **civil liability** against a consumer or a person in terms of money **for theft of**

energy which shall be at least two times the amount as per the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft, if determined, whichever is less. **The amount of civil liability so determined shall be recovered as if it were a decree of civil court.** Sub-section (6) also provides that in case the civil liability so determined finally by the Special Court is less than the amount deposited by the consumer or the person liable, the excess amount so deposited by the consumer or the person liable shall be refunded with interest at the prevailing bank rate.

Section 156 confers on the **High Court** the powers of **appeal** and **revision** against the orders of the Special Court as per the provisions of Chapters XXIX and XXX of Cr PC, as if the Special Court is a **District Court**, or as the case may be, the Sessions Court trying cases within the territorial jurisdiction of the High Court.

Section 157 confers powers of review on the Special Court on certain grounds.

5.4 Part VI of the New Act contains provisions with respect to distribution of electricity by licensees and recovery of charges.

Section 45(1) confers power on the distribution licensee to recover charges for the supply of electricity in accordance with such tariffs

fixed from time to time and conditions of the license. Sub-sections (2), (3) and (5) read as under:-

> "(2) The charges for electricity supplied by a distribution licensee shall be -
>
> (a) fixed in accordance with the methods and the principles as may be specified by the concerned State Commission;
>
> (b) ... .
>
> (3) The charge for electricity supplied by a distribution licensee may include -
>
> (a) a fixed charge in addition to the charge for the actual electricity supplied;
>
> (b) ... ...
>
> (5) The charges fixed by the distribution licensee shall be in accordance with the provisions of this Act and the regulations made in this behalf by the concerned State Commission."
>
> (emphasis supplied)

[Section 82 in Part X provides for constitution of State Electricity Regulatory Commission and also provides that the State Commission shall discharge such other functions as may be assigned to it under the Act. Section 181 in Part XVIII confers powers on the State Commissions to make, after previous publication, regulations consistent with the Act and the Rules generally to carry out the provisions of the Act including the

provisions of Electricity Supply Code and also to make regulations for the form and manner of filing the appeal. The regulations to be framed by the State Commission shall be laid before each house of the State legislature].

To continue with Part VI, Section 50 of the Act is important and is required to be quoted verbatim.

> "50. **The Electricity Supply Code**. - The State Commission shall specify an Electricity Supply Code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity, tampering, distress or damage to electrical plant, electric lines or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter, entry for replacing, altering or maintaining electric lines or electrical plant or meter."
>
> (emphasis supplied)

Section 56 empowers the licensee to disconnect electricity supply after giving atleast fifteen clear days' notice in writing and may discontinue the supply until the sums due and payable by the person liable together with any expenses incurred by the licensee in cutting and reconnecting the supply, are paid but no longer – provided that the supply of electricity shall not be cut off if

such person deposits, under protest, -

> "(a) an amount equal to the sum claimed from him, or
> (b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months,
>
> whichever is less, pending disposal of any dispute between him and the licensee.
>
> [emphasis supplied]

5.6 Part VII contains provisions relating to tariff. Section 62 empowers the Appropriate Commission (which would be State Electricity Regulatory Commission for the present purposes) to determine the tariff in accordance with the provisions of this Act, inter alia, for retail sale of electricity.

5.7 Section 183 in Part XVIII confers power on the Central Government to remove difficulties within a period of two years from the date of coming into force of the Act.

CONTROVERSY & ITS STATUTORY RESOLUTION

6. The controversy giving rise to the appeals and the writ petitions was whether the provisions of Sections 126 and 127 for assessment and appeal relating to "unauthorised use of electricity" in Part XII of the Act are also applicable to theft cases

defined in Part XIV of the Act or whether the licensee's power to recover charges in theft cases was governed only by the provisions contained in Parts XIV and XV.

While Hon'ble M/s Justice AL Dave and Justice Jayant Patel took the view that even in the cases of theft of electricity, assessment is required to be made under the provisions of Section 126 of the Act and such assessment would be appealable under Section 127 of the Act, that Section 135 of the Act is aimed at prosecution of consumers indulging in theft of electricity but Sections 50 and 135 do not contemplate issuance of a bill in theft cases and that under Section 145 jurisdiction of Civil Court is not excluded where the licensee has not acted in accordance with the provisions of the Act or has acted in violation of the principles of natural justice.

On the other hand, Hon'ble Mr Justice DN Patel took the view that even in cases of theft of electricity by consumers covered by Section 135, assessment is required to be made under the provisions of Section 154(5) of the Act and that Sections 126/127 do not apply to a case where the consumer has committed theft of electricity; that the unauthorised use of electricity in Section 126 refers to a case where consumer may have used excessive load as compared to the permissible load or to a case where some other person, such as predecessor in title

of the consumer, may have committed the theft and the consumer is making use of such tampered meter without the knowledge that the meter was tampered. The conclusion of Hon'ble Mr Justice Ravi R. Tripathi in the judgment dated 30.6.2004 could also be supported on the same reasoning.

The controversy did indeed give rise to serious difficulties, because Section 50 did not specifically empower the State Electricity Commission to provide for assessment of electricity charges in theft cases nor did it provide for other powers of the licensee in theft cases.

7. Realizing these difficulties, the Central Government invoked the powers under Section 183 of the Electricity Act, 2003 which reads as under:-

> "**183. Power of remove difficulties.-** (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published, make such provisions not inconsistent with the provisions of the Act, as may appear to be necessary for removing the difficulty :
>
> Provided that no order shall be made under this section after the expiry of two years from the date of commencement of this Act.
>
> (2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament."

Within two years of the Central Government having brought the provisions of the Act into force

on 10th day of June 2003, in exercise of the powers conferred by Section 183 of the Act, the Government of India in the Ministry of Power issued Order No.790(E) dated 8th June 2005 called the Electricity (Removal of Difficulties) Order, 2005 which was brought into force on 8th June 2005. The order reads as under :-

Ministry of Power

ORDER

New Delhi, **the 8th June, 2005**.

S.O. 790(E) – Whereas the Electricity Act, 2003 (36 of 2003) (hereinafter referred to as the Act) came into force on the 10th June, 2003 :

And whereas section 50 of the Act provides that the State Commission shall specify an Electricity Supply Code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity, tampering, distress or damage to electrical plant, electric lines or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter, entry for replacing, altering or maintained electric lines or electrical plant or meter;

And whereas the distribution licensees have expressed difficulties in controlling theft of electricity and in taking appropriate action in this regard;

And whereas enabling the distribution licensees for taking timely and appropriate action in cases of theft or diversion of electricity has become necessary for the development of electricity industry and ensuring supply of electricity to all areas;

And whereas taking measures conducive to

development of electricity industry and supply of electricity to all areas are objectives, amongst others, of the Act, as stated in its preamble;

And whereas the difficulties have arisen in giving effect to the provisions of the Act in controlling theft of electricity by the distribution licensees;

Now, therefore, the Central Government, in exercise of its powers conferred by section 183 of the Act hereby makes the following order in respect of electricity supply code in terms of section 50 of the Act, not inconsistent with the provisions of the Act, to remove the difficulties, namely, -

1. **Short title and commencement.-**

(1) This order may be called the Electricity (Removal of Difficulties) order, 2005.

(2) It shall come into force on the date of publication in the Official Gazette.

2. **Inclusion of measures to control theft in Electricity Supply Code**.

(1) The Electricity Supply Code as specified by the State Commission under section 50 of the Act shall also include the following namely :-

(i) method of assessment of the electricity charges payable in case of theft of electricity pending adjudication by the appropriate court;

(ii) disconnection of supply of electricity and removing the meter, electric line, electric plant and other apparatus in case of theft or unauthorized use of electricity; and

(iii) measures to prevent diversion of electricity, theft or unauthorized use of electricity or tampering, distress

or damage to electrical plant, electric lines or meter.

(2) The above provisions in the Electricity Supply Code shall be without prejudice to other rights of the licensee under the Act or any other applicable laws to recover the sum due and to protect the assets and interests of the licensee.

[F.No. 23/54/2004-R&P]
(Ajay Shankar)
Additional Secretary"

[Emphasis supplied]

There is no dispute about the fact that the above order was published in the gazette on 8th June 2005.

8. We may now refer to the **Electricity Supply Code** framed by the Gujarat Electricity Regulatory Commission under Section 50 of the Act.

8.1 The Gujarat Electricity Regulatory Commission issued notification No.11 of 2005 dated 31.3.2005 framing the Gujarat Electricity Regulatory Commission (Electricity Supply code and Related matters) Regulations, 2005 (hereinafter referred to "the Regulations"). Regulation 7 (called Section 7 in the Electricity Supply Code as framed on 31.3.2005) contained the following provisions for assessment under Section 126 and for assessment in theft cases :-

Section 7 - Restrictions (i.e. Regulation 7)

of the Regulations is material for the purpose of the present controversy. Regulations 7.1 to 7.4 are in similar terms as the provisions of Section 126. Regulations 7.2.3 and 7.2.4 read as under :-

> "7.2.3 **The assessment under this section shall be made at a rate equal to one-and-half times the tariff rates applicable for the relevant category of services.**
>
> 7.2.4 The assessment under this section shall be worked out in the manner prescribed in the Annexure – B."

Regulation 7.5 is on the same lines as the provisions of Section 127.

Annexure – B to the Regulations contains detailed guidelines for assessment to be made under Regulation 7.2 including factors such as factor load at the time of inspection, diversity factors and average load factor and number of hours in a month. It is not necessary to refer to those detailed guidelines.

Regulation 7.6.1 defines theft of electricity and provides for penal consequences therefor in the same terms as in Section 135(1) of the Act. Similarly, Regulations 7.6.2 to 7.6.4 contain the same provisions as are contained in sub-sections (2) to (4) of Section 135. Regulation 7.7 contains provisions for compounding of offences.

What is required to be noted at this stage is the provisions of Regulations 7.6.5 to 7.6.8 which read as under till 13.12.2005 :-

> "7.6.5 **The assessment for the theft of electricity shall be made in accordance with section 7.2.**
>
> 7.6.6 **In case of prima-facie clear evidence of theft of electricity** as specified in the sub-sections (a), (b) and (c) of the section 135 of the Electricity Act, 2003, **the installation will be liable for disconnection.**
>
> If the consumer pays the amount of assessment for the theft of electricity, the licensee shall forthwith restore the connection.
>
> 7.6.7 **In case of any dispute including any dispute about assessment, the matter should be submitted forthwith by licensee for cognizance in the Court** (within whose jurisdiction it has arisen) as specified under section 151 of the Act. **Any direction needed in connection with such matters shall be obtained from the Court.**
>
> 7.6.8 If any clarifications regarding these matters covered in this Code are issued by Government of India or by higher judicial fora, they will be treated as part of the Supply Code."
>
> (emphasis supplied)

8.2 In view of the aforesaid order dated 8th June 2005 of the Central Government removing the

difficulties regarding provisions which may be incorporated in the Electricity Supply Code in respect of theft cases, the Gujarat Electricity Regulatory Commission made the amendment to the Regulations by notification dated 14th December, 2005 in the following terms :-

GUJARAT ELECTRICITY REGULATORY COMMISSION

No. GERC/TECH-I/227/2005 14th December, 2005

NOTIFICATION

In exercise of the powers conferred under Section 181(2)(x) read with Section 50 of the Electricity Act, 2003 (Act 36 of 2003) and Order No.S.O. 790(E) dt. 8th June, 2005 of the Minister of Power, Government of India, the Gujarat Electricity Regulatory Commission hereby amend the Electricity Supply Code and Related matters Regulations (No. 11 of 2005), the principal Regulations.

1. Short Title, Extent and Commencement

(1) These Regulations may be called the Gujarat Electricity Regulatory Commission (Electricity Supply Code and Related matters) (First Amendment) Regulations, 2005.

(2) <u>These Regulations shall come into force on the date of their publication in the Gazette.</u>

2. Amendment to section 7.6.5 of the principal Regulations:

Section 7.6.5 of the principal Regulations shall be substituted as under:-

(a) <u>The Assessment under this section shall be made</u>

at the rate equal to two times of the tariff rates applicable subject to pending adjudication by the competent court.

The assessment under this section shall be applicable for a period of 12 months preceding the date of detection of the theft or the exact period of the theft whichever is less.

The Exact Period may be arrived at by following guidelines or any combination thereof or any other evidence which may be provided by the consumer.

(i) Meter Reading Instrument (MRI) data should be considered wherever available.

(ii) Actual period from the date of commencement of supply to the date of detection of theft.

(iii) Actual period from the date of replacement of component of metering system in which the evidence is detected to the date of detection of theft.

(iv) The actual period from the date of previous checking of installation to date of detection of theft.

(b) The assessment shall be worked out in the manner prescribed in Annexure-B of the principal Regulations for assessment of Theft as well."

3. Amendment in the Annexure-B of the principal Regulations:

...."

P.S. SHAH
SECRETARTY

AHMEDABAD
DATE : 14th December, 2005.

(emphasis supplied)

The amendment made in Annexure B of the Regulations is not material for the present

controversy. There is no dispute about the fact that the above notification was published in the Gazette dated 14th December 2005.

9. In view of the aforesaid Government of India Order dated 8th June 2005 and the amendment made by the Gujarat Electricity Regulatory Commission to the Electricity Supply Code w.e.f. 14th December 2005, the controversy no longer survives for the cases detected on or after 14th December 2005, because the clear legal position which now emerges is that assessment to be made by the licensee in theft cases is not governed by the provisions of Section 126 of the Act, but it governed by the provisions of Section 50 read with Regulation 7.6.5 of the Electricity Supply Code as framed by the Gujarat Electricity Regulatory Commission and amended w.e.f. 14th December 2005. Against such assessment, remedy of appeal under Section 127 of the Act is not available to the aggrieved party, but its remedy will be only before the Special Court constituted under Section 153 of the Act which will exercise in its jurisdiction in accordance with the provisions of sub-sections (5) and (6) of Section 154 of the Act.

Major contentions of the petitioners

10. The learned counsel for the consumers would still submit that -

(a) theft of electricity dealt with by

Section 135 is covered by the broader expression “unauthorised use of electricity” dealt with by Section 126 and, therefore, assessment in theft cases is also required to be made under Section 126 which embodies the principles of natural justice;

(b) not applying the provisions of Section 126 to theft cases would mean conferring power on the licensee to make penal assessment without following principles of natural justice;

(c) order dated 8.6.2005 by the Central Government in purported exercise of Section 183 of the Act is illegal, so also the consequential amendment to the State Electricity Supply Code;

(d) the Special Court can be moved only by the authority or licensee as provided in Section 151, but even in cases of alleged theft, the consumer is not given any right to approach the Special Court.

Are theft cases in Section 135 covered by the expression “unauthorised use of electricity” in Section 126 ?

11. It was contended on behalf of the

petitioners that -

11.1 The scheme of Electricity Act, 2003 has not undergone major changes on the question of theft of electricity, ascertainment of financial liability of the consumer for theft and criminal consequences flowing due to the criminal offence of theft. Theft as an offence was defined under Section 39 of the 1910 Act (which section came to be amended by Act No.31 of 1986). While framing the New Act, the Legislature has substantially retained the very same language in which theft as a criminal offence was defined under Section 39 of the 1910 Act, but has elaborated the said definition

11.2 A perusal of comparative provisions would show that the very same provisions which were enacted under the Chapter “Criminal offences and procedure” in the 1910 Act are repeated in the new Act, under the Chapter “Offences and Penalties”. The very fact that Section 135 is included in the Chapter “Offences and Penalties” would show that the said Chapter only deals with defining theft as a criminal offence and providing for punishment. All the provisions contained in Part XIV deal with criminal offences, prosecution for the same, and conviction.

11.3 Since Section 135 makes tampering a meter an offence and explanation (b) to Section 126, includes use of a tampered meter in the definition of unauthorised use of electricity so as to attract best

judgment assessment under Section 126, the Legislative intent is defining unauthorized use of electricity widely for the purpose of fastening civil liability under Section 126 of the Act and to ensure that the very same Act is also made an offence punishable under Section 135 of the Act, by giving a broad-based definition of theft as a criminal offence.

12. We are unable to accept the contention raised on behalf of the petitioner – consumers.

12.1 Having considered the relevant statutory provisions, the legislative history and the legislative intent to curb theft of electricity with a heavy hand (as reflected in harsher sentences), it appears to us that all the cases of theft as enumerated and illustrated in sub-section (1) of Section 135 are cases where there has to be a dishonest act. Sub-section (1) of Section 135 opens with the words,

> "Whoever, **dishonestly** -
>
> (a) .. ..
>
> (b) tampers a meter, installs or uses a tampered meter, ... or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or
>
> (c) ... .
>
> so as to obstruct or consume or use electricity shall be punishable with imprisonment for a term

which may extend to three years or with fine or with both.

The minimum fine to be imposed is also three/six times the financial gain on account of such theft of electricity in case of first/subsequent conviction. The minimum civil liability is two times the applicable tariff in theft cases as provided in Section 154(5) for a maximum period of twelve months.

On the other hand, Section 126 read with explanation (b) thereto does not require any mens rea on the part of the proprietor of the premises or any other person, in order to empower the assessing officer to exercise the power of best judgment assessment which is to be made at a rate equal to one-and-half times the tariff applicable for maximum three months prior to the date of inspection (in case of domestic and agricultural services) and for a period of six months prior to the date of inspection (for all other categories of services). The presumption about the duration for which electricity was unauthorisedly used is of course rebuttable by the person or occupier or in possession of the premises/place.

12.2 Reference to the statutory conditions of supply framed by the two licensees who are before us (GEB & Ahmedabad Electricity Co. Ltd.) under the Acts of 1910 and 1948 also indicates that the licensees had also made distinction between cases of malpractice and cases of theft. The cases of

malpractice under those statutory conditions of supply were more or less similar to the cases of “unauthorised use of electricity” as defined in explanation (b) to Section 26 of the new Act (subject to discussion about unauthorised use of electricity through tampered meter). By making separate provisions under Section 126/127 on the one hand and Sections 135 and 154 on the other hand, the Legislature has not merely stopped at maintaining the distinction between the cases of malpractice (now known as unauthorised use of electricity) and cases of theft as defined in Section 135 on the other hand, but has consciously legislated to treat them separately and to provide harsh criminal punishments and heavy fines and also higher civil liability (two times the applicable tariff for maximum twelve months) in cases of theft as against mere civil liability (one and half times applicable tariff for maximum six months) in case of unauthorised use of electricity.

Now coming to the discussion about unauthorised use of electricity through tampered meter, the words “through tampered meter” are eloquent and they do not necessarily mean that a person drawing electricity through a tampered meter is aware about the meter having been tampered. Hence, the ingredient of dishonesty which is an essential ingredient for constituting offence under Section 135 is not to be found in the definition of “unauthorised use of electricity” in explanation (b)

to Section 126 which appears to be covering cases such as - where the consumer is making use of a meter tampered by his predecessor in title without the knowledge that the meter was tampered or the cases whether the consumer has used excessive load as compared to the permissible load. But where the consumer knowing that the meter is tampered (by himself or somebody else) draws electricity through the same would be guilty of the offence under Section 135(1)(b).

12.3 On interpretation, therefore, we hold that the expression “unauthorised use of electricity” in Section 126 only deals with cases of unauthorised use even in absence of mens rea and such cases are different from the theft cases enumerated and illustrated in Section 135(1) which involve mens rea.

12.4 Similar view has been taken by the Delhi High Court in the judgment dated **31.5.2004** in **Sohanlal vs. North Delhi Power Ltd.** in Writ Petition (C) No. 649/04 and allied matters. However, in absence of removal of difficulty by Central Government order dated 8th June 2005, which came much later after the Delhi High Court judgment, the decision does not indicate as to how, even in absence of any statutory power conferred on the licensee, the licensee itself could make assessment in theft cases at two times the applicable tariff for a maximum period of twelve months.

13. Does Assessment in theft cases require compliance with principles of Natural Justice ?

13.1 Mr Tushar Mehta for the petitioners vehemently submitted that assessment under Section 126 embodies the principles of natural justice. The Legislature could not have intended that assessment in theft cases could be made without complying with the principles of natural justice.

13.2 We are unable to accept this contention either. Since such contentions raised under the repealed laws were outright rejected by the Apex Court, we may turn to them. In MP Electricity Board vs. Harsh Wood Products, AIR 1996 SC 2258 = (1996) 4 SCC 522 and in Hyderabad Vanaspathi vs. APSEB, (1998) 4 SCC 470, the Apex Court has laid down that where a consumer is prima-facie found by the licensee to have committed theft of electricity, it is not necessary for the licensee to give any notice or an opportunity of hearing before disconnecting electricity supply and that the supply may be restored only if the consumer compensates the licensee or pays off the dues as per the bill which may be prepared by the licensee. The Court held that the action taken by the Electricity Board in exercise of the powers under the Conditions of Supply framed under the Electricity (Supply) Act, 1948 was neither violative of Articles 20(1) and 14 of the Constitution nor violative of the principles of natural justice. The Court further held

that the provision for a departmental appeal and judicial review under Article 226 thereafter were sufficient safeguards. Now that the Electricity Act, 2003 itself provides a statutory remedy before the Special Court (presided over by a Judicial Officer in the cadre of District Judges as compared to a Judicial Officer in the lower cadre of Civil Judges presiding over the Civil Court) and further appeal/revision under Section 156 before this Court as discussed in para 15 hereafter, we find that these are sufficient safeguards. Accordingly the contention based on principles of natural justice is also rejected.

14. Challenge to Central Government order dated 8the June 2005 and Amendment dated 14th December 2005 to Electricity Supply Code.

14.1 It is also submitted on behalf of the consumers that order dated 8th June 2005 issued by the Central Government in purported exercise of power under Section 183 of the Act is illegal and the consequential amendment to Regulation 7.6.5 to the Gujarat Electricity Supply Code is also illegal.

14.2 It is required to be noted that the petitioners have not challenged the constitutional validity of the provisions of Section 183 of the Act but have merely challenged the order dated 8th June 2005 issued by the Central Government under Section 183 of the Act and the subsequent amendment by the State Electricity Commission dated 14th December

2005.

14.3 Mr Tushar Mehta for some of the consumers relied on several decisions of the Apex Court in support of his contention that under the guise of "removal of difficulties", the Central Government cannot alter the entire scheme and make new provisions and that the subordinate legislation cannot provide for a separate remedy or confer additional powers running contrary to the provisions of the parent Act.

14.4 Before dealing with the above submission, we may refer to the principles laid down by the Apex Court in this behalf. In **MU Sinai vs. Union of India, AIR 1975 SC 797**, a Constitution Bench of the Apex Court has accepted the presence of removal of difficulty clause in a statute as a practical necessity by acknowledging that to keep pace with the rapidly increasing responsibilities of a welfare-democratic State, the legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the legislature and the endurance and skills of the draftsman, it is well nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working. This is particularly true when Parliament undertakes legislation which gives a new dimension to socio-

economic activities of the State. In order to obviate the necessity of approaching the legislature for removal of every difficulty encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance.

Depending on whether one likes or dislikes this method of removing difficulties in implementation of a legislative enactment, such removal of difficulty clause is known either as “the draftsman's insurance clause” (Sir Cecil Carr as quoted in Administrative Law by Hon'ble M Justice CK Thakkar, 1st Edition, page 57) or Henry VIII clause.

Whatever may be one's personal predilections, the Hon'ble Supreme Court has laid down the following restrictions on the exercise of such power of the Government to issue orders for removing difficulties :-

(i) The “difficulty” contemplated by the clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty.

(ii) The Government can exercise the power under the clause only to the extent it is necessary for applying or giving effect to the Act and no further.

(iii) The Government may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.

[(i) to (iii) in M.U. Sinai (supra) Para 47].

(iv) Although it is for the Government to subjectively satisfy itself that a difficulty has arisen before an order can be issued under the power to issue orders for removal of difficulties, but that satisfaction is not conclusive. It is the duty of the Court concerned to examine for itself whether there was a reasonable basis for the Government to have come to such a conclusion. Although it is not for the Court to determine for itself in the first instance whether such a difficulty, as

contemplated, had arisen, it is open to the Court to see whether the Government had a sound basis to come to the conclusion that such a difficulty had arisen (Maharana Mills Pvt. Ltd. vs. IT Tribunal, Ahmedabad, AIR 1989 SC 1719 – para 18).

(v) The essential legislative function consists of determination of the legislative policy and the Legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the Legislature to another body of its choice but the Legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates (Agricultural Market Committee vs. Shalimar Chemical Works Ltd., AIR 1997 SC 2504 – para 26 – in relation to valid delegation of legislative power).

14.5 Applying the aforesaid principles, we are unable to uphold the challenge because we find that the Central Government order dated 8th June 2005 does not change, disfigure or do violence to the basic structure and primary features of the Electricity Act, 2003. It does not at all change the scheme and

essential provisions of the Act because even before 8th June 2005, the Electricity Act 2003 as originally enacted had already provided for two separate categories of cases :-

A Cases of unauthorised use of electricity

(i) machinery under Section 126/127 for assessment by assessing officer in case of unauthorised use of electricity without mens rea,

(ii) liability to be assessed at the rate of one and a half times the tariff for a maximum period of 3 months/6 months, as the case may be.

B Theft cases

(i) establishment of special Courts under Section 153 to try offences punishable under Sections 135 to 139 including cases of theft of electricity where mens rea is required to be proved. Stringent punishments and penalties to be imposed by the Court were also provided.

(ii) Section 154 also provided for powers of the Special Court. Sub-section (5) of Section 154 as already enacted by the Parliament specifically provided that the Special Court constituted to try cases of theft of electricity may determine the civil liability at a rate

equivalent to an amount not less than two times the tariff applicable to the concerned consumer and that too for a maximum period of 12 months.

The Legislature had thus already provided two separate machineries for cases of unauthorised use of electricity even in absence of mens rea on the one hand and cases of theft with mens rea on the other hand.

Genuine and serious difficulty arose because even while Section 54(5) empowered the Special Court to determine civil liability in theft cases at the rate of two times the applicable tariff for a period of twelve months prior to the date of detection (over and above the fine at three times the amount of financial gain on account of theft), Section 50 of the Act empowering the State Electricity Regulatory Commission to frame the State Electricity Supply Code to provide for recovery of electricity charges, disconnection of electricity for non payment and tampering did not specifically provide for the power of the Commission to prescribe as to how the licensee could make assessment in theft cases. The order dated 8th June 2005 of the Central Government under Section 183 of the Act has removed the difficulty by providing that the Electricity Supply Code may also provide for the method of assessment of electricity charges payable in case of theft of electricity pending adjudication by the proper Court. The said order dated 8th June 2005 and

Amended Regulation (Section 7.6.5) of the Electricity Supply Code with effect from 14th December 2005, providing for assessment in theft cases at the rate of two times of the tariff rates applicable subject to adjudication by the Special Court for a maximum period of twelve months are quite in conformity with the basic scheme embodied in the existing provisions of the Electricity Act, 2003. We, therefore, do not find that the said Order dated 8the June 2005 or Amended Regulation 7.6.5 confer additional powers running contrary to the scheme of the parent Act as contended on behalf of the petitioners.

14.6 Hence, challenge to the Order dated 8th June 2005 of the Central Government and the notification dated 14th December 2005 of the Gujarat State Electricity Regulatory Commission is turned down.

15. Ouster of Jurisdiction of Civil Court

15.1 We may now deal with the submission made by the learned counsel for the petitioner-consumers who contended that in a given case the consumer may or may not dispute the allegation of theft made by the licensee or its officers, but the consumer may still dispute the amount of supplementary bill issued in theft cases. It is submitted that the Act does not provide for any remedy in such cases and that Section 151 allows only licensee or authorities to move the Court with a complaint to take cognizance of an offence, but no provision in the Act provides for an

appeal or other proceeding at the instance of the consumer to challenge assessment made by the licensee in a theft case. It is, therefore, submitted that the powers of the Civil Court cannot be treated to have been excluded when there is no remedy provided by the Act in such cases.

15.2 We do not think that a consumer is without remedy in such cases. Sub-section (5) of Section 154 specifically provides that the Special Court may determine the civil liability against a consumer or a person in terms of money for theft of energy. The next part of sub-section (5) imposes the following restrictions on the power of the Special Court to determine the civil liability -

(i) the quantum of liability in terms of money shall not be less than two times the tariff rate applicable to the concerned consumer;

(ii) the liability shall be determined for a period of maximum twelve months prior to the date of detection of theft of energy or the exact period of theft if determined, whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil Court.

(iii) the deposit of any amount already made shall be adjusted against such civil liability.

15.3 There is nothing to indicate that the power and jurisdiction conferred on the Special Court under sub-section (5) of Section 154 is conditional upon the licensee filing a complaint before the Special Court under Section 151 of the new Act. In fact while the provisions relating to offences and penalties from Sections 135 to 139 are to be found in Part XIV of the new Act, and Section 151 in the same Part provides that cognizance of an offence under those sections can be taken only at the instance of the Government, the Commission or the licensee, the provisions relating to the Special Court are to be found in a separate part being Part XV of the Act. Since the power to try offences punishable under Sections 135 to 139 is conferred exclusively on the Special Court constituted under Section 153 of the Act and the provisions of sub-section (5) of Section 154 specifically invest the Special Court with the jurisdiction to determine any dispute regarding the quantum of civil liability in theft cases, we are clearly of the view that a consumer intending to challenge the quantum of civil liability in theft cases (whether or not he disputes the allegation of theft) is still entitled to make such a challenge to the disputed bill before the Special Court, even in cases where no criminal complaint is filed against the consumer. The doubt, if any, is removed by Regulation 7.6.7 in the Gujarat Electricity Supply Code (quoted in para 8.1).

15.4 The next question is whether maintainability

of such proceeding at the instance of the consumer as discussed above necessarily excludes the jurisdiction of Civil Court. The relevant principles regarding ouster of jurisdiction of Civil Court were laid down by the Apex Court in **Dhulabhai vs. State of MP, AIR 1969 SC 78** (para 32) = (1968) 3 SCR 662 as under :-

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (emphasis supplied on behalf of the consumers)
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in

civil courts are prescribed by the said statute or not.

(3) & (4) .... (dealing with cases of challenge to constitutionality).

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil Court is not readily to be inferred unless the conditions above set down apply."

(emphasis supplied)

15.5 The scope of the apparently wide observations in principle (1) relied upon by the petitioners has been considerably narrowed down by the Nine Judge Bench in Mafatlal Industries Ltd. vs. Union of India, (1997) 5 SCC 536 (729). In paras 329 and 333 of the said judgment, the Apex Court quoted with approval the following principle laid down by another Constitution Bench in Firm of Illuri S Chetty AIR 1964 SC 322 = (1964) 1 SCR 752 :-

"... Non-compliance with the provisions of the statute, to which reference is made by the Privy Council (in Mask & Co. case, AIR 1940 PC 105 = 67 IA 222) must, we think, be non-compliance with such fundamental provisions of the statute

> as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles or judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void .."
>
> (emphasis supplied by the Apex Court in Mafatlal Industries Case)

15.6 As already noticed earlier, sub-section (5) of Section 154 not only empowers the Special Court to determine civil liability of the consumer in theft cases as per the parameters indicated therein, but also provides that the amount of civil liability so determined shall be recovered as if it were a decree of civil Court. Sub-section (6) of Section 154 also provides that in case the civil liability so determined finally by the Special Court is less than the amount deposited by the consumer, the excess amount so deposited by the consumer shall be refunded by the Board or the licensee within a fortnight from the date of communication of the order of the Special Court together with interest at the prevailing bank rate from the date of such deposit till the date of payment.

Section 156 further confers on the High Court the powers of appeal and revision as if the Special Court is a District Court or, as the case may

be, the Court of Sessions trying cases within the local limits of jurisdiction of the High Court. (This implies that it is the District Court i.e. a Civil Court, which determines the civil liability).

Section 157 also confers powers of review on the Special Court in wider terms than the provisions of Order 47, Rule 1 CPC.

By notification dated 21.6.2004, in exercise of the powers conferred by Section 153(1) of the Electricity Act, 2003, the Government of Gujarat has constituted a Special Court for each district consisting of Additional District and Sessions Judge and for the City of Ahmedabad consisting of City Civil and Sessions Judge for the purposes of providing speedy trial of offences referred to in Sections 135 to 139 of the said Act.

15.7 Thus, although Sections 153 and 155 and sub-sections (1) to (4) of Section 154 may give an impression that a Special Court is merely a Criminal Court set up to try offences, the provisions of sub-sections (5) and (6) of Section 154 and Sections 156 and 157 unmistakably show that the Special Court has adequate powers to do what the Civil Court could normally do in a civil suit and that its orders have the same efficacy, recognition and binding effect as the decree of a Civil Court. Thus principle (1) laid down by the Apex Court is satisfied.

Sub-section (5) of Section 154 also creates a special civil liability of the amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy. The provisions of appeal, revision and review also satisfy the test laid down by the Apex Court as contained in principle 2 – whether remedies normally associated with actions in civil courts are prescribed by the statute or not.

The provisions of refund as contained in sub-section (6) of Section 154 also take care of principle (5) laid down by the Apex Court.

16. After undertaking the inquiry as mandated by the Apex Court in Dhulabhai case (Supra), we hold that the Electricity Act, 2003 read with the Central Government order dated 8th June 2005 and the Electricity Supply Code framed under Section 50 of the Act and the Statutory Regulations framed under the other provisions of the Act constitute a complete self-contained code in respect of criminal as well as civil liability in cases of theft of electricity and also in respect of the civil liability for unauthorised use of electricity. Hence, although there is no specific reference in Section 145 of the Act to exclusion of Civil Court to entertain any proceeding in respect of any matter which the Special Court is empowered by the Act to determine or any assessment (other than assessment under Section 126) which the licensee is empowered under the Act to

determine, we are of the view that any dispute about the civil liability in theft cases is impliedly excluded from the jurisdiction of Civil Court.

17. In para 13 hereinabove, we have already rejected the contention that assessment in theft cases is required to be made after following the principles of natural justice. Having said so and having held that the jurisdiction of Civil Court is impliedly excluded and having regard to the principle discussed in para 15.5 hereinabove, we cannot allow the jurisdiction of Civil Court to be made available through backdoor by holding that Civil Court can still have jurisdiction in a case where the plaintiff complains against assessment in theft cases by invoking principles of natural justice, or by pleading breach of provisions of the Act when the later grievance can be looked into by the Special Court. We, therefore, hold that the observations to the contrary in the judgment under appeal do not lay down the correct law.

Periodization

18. While the above discussion concludes the controversy in cases of theft detected on or after 14th December 2005, a few questions still need to be answered in view of the fact that in most of the appeals/petitions argued before us theft was detected prior to 14th December 2005. For the sake of convenience, we may set out the different periods for

more focused discussion of the issues raised by the learned counsel for the parties :-

I Cases where theft was detected during the period from 10th December 2003 to 9th December 2004.

II Cases where theft was detected during

(A) period from 10th December 2004 to 30th March 2005.

(B) period from 31st March 2005 to 13th December 2005

III Cases where theft has been detected on or after 14th December 2005.

19 Cases where theft detected during period from 10th December 2003 to 9th December 2004

19.1 The Central Government specified 10th day of June 2003 as the date on which Sections 1 to 120 and Section 122 to 185 of the Electricity Act, 2003 came into force. Clause (d) of Section 172 containing transitional provisions reads as under :-

> "172. Transitional provisions.-Notwithstanding anything contrary contained in this Act,-
>
> (d) the State Government may, by notification, declare that any or all the provisions contained in this Act, shall not apply in that State for such period, not exceeding six months from the appointed date, as may be stipulated in the notification."

By notification dated 4th July 2003, the Government of Gujarat declared that all the provisions of the Electricity Act, 2003 shall not apply in the State for a period of six months from the appointed date i.e. 10th June, 2003. Accordingly, the provisions of the new Act came to be applied in the State of Gujarat with effect from 10th December 2003.

19.2 However, clauses (a) and (b) of Section 172 also provide as under :-

> "172. Transitional provisions .- Notwithstanding anything to the contrary contained in this Act,-
>
> (a) a State Electricity Board constituted under the repealed laws shall be deemed to be the State Transmission Utility and a licensee under the provisions of this Act for a period one year from the appointed date ... .
>
> Provided that the State Government may, by notification, authorise the State Electricity Board to continue to function as the State Transmission Utility or a licensee for such further period beyond the said period of one year ... .
>
> (b) all licenses, ... granted under the provisions of the repealed laws may, **for a period of not exceeding one year from the appointed date** or such earlier period as may be notified by the Appropriate Government, continue to operate as if the repealed laws were in force with respect to such licences, ... **and thereafter such licences**, ... **shall be deemed to be licences**, ... **under this Act and all provisions of this Act shall apply accordingly to such licences**, ..."

(emphasis supplied)

19.3 In view of the provisions of Section 172(b), it is clear that licenses in favour of the GEB and the AEC under the repealed laws continued to be valid till 9.12.2004 (for a period not exceeding one year from the appointed date which was 10.12.2003 for the State of Gujarat) and, therefore, the contention urged on behalf of the licensees must be accepted without any difficulty for the period upto 9.12.2004. Hence, as regards the cases where theft was detected prior to 10.12.2004, the matters will be governed by the Conditions of Supply and Miscellaneous Charges for supply of Electrical Energy framed by the GEB or by the AEC, as the case may be. Since, during this period, the consumers were governed by the Conditions of Supply and Miscellaneous charges and not by the provisions of the new Act, the question of ouster of jurisdiction of Civil Court would not arise in cases where theft was detected before 10.12.2004. But while deciding applications for interim injunction, Civil Court shall have to consider the principles laid down by this Court in Kiran Industries vs. GEB, 1995 (2) GLR 1158.

20(A) Period from 10th December 2004 to 30th March 2005

(B) Period from 31st March 2005 to 13th December, 2005.

20.1 It is stated on behalf of the GEB that by

virtue of the notifications dated 10.6.2004 and 8.12.2004 of the State Government, the GEB continued to function as licensee right upto 31.3.2005. Under the Gujarat Electricity Industry (Reorganization and Regulations) Act, 2003 and the scheme framed thereunder, w.e.f 1.4.2005 the powers, duties and obligations of the GEB came to be vested in the Government of Gujarat and reinvested by the Government into Gujarat Energy Transmission Corporation Limited, Gujarat State Electricity Corporation Limited and the Uttar Gujarat Vij Co. Ltd., Dakshin Gujarat Vij Co. Ltd., Paschim Gujarat Vij Co. Ltd. and Madhya Gujarat Vij Co. Ltd.. It is contended on behalf of the Torrent Power AEC Ltd. as well as the GEB that by virtue of the provisions of Section 185(2), notwithstanding the repeal of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948, all the Rules, notifications and licenses made or issued under the repealed laws shall, in so far as they are not inconsistent with the provisions of the Act, be deemed to have been done or taken in accordance with the provisions of the Act.

It is also the contention urged on behalf of the AEC that in exercise of powers conferred by Section 21 of the Indian Electricity Act, 1901, the AEC Ltd. had framed Conditions of Supply and Miscellaneous Charges, particularly condition Nos. 22 and 23 read with Part II of the Conditions of Supply providing for definition of malpractice and theft of

energy and the mode of assessment and also the power to disconnect electricity supply in case of detection of theft or malpractice for which the charges as assessed by the licensee are not paid. The brief reference to the said provisions has already been made earlier in para 3.3 of this judgment. It is, therefore, vehemently submitted that even in absence of any specific detailed provisions for assessment of charges in theft cases, the supplementary bills issued by the AEC at two times the applicable tariff which are impugned in these appeals/petitions were in accordance with the Conditions of Supply and Miscellaneous Charges and, therefore, in accordance with law.

Similar contention was raised on behalf of the GEB to claim liberty to revise the bills in theft cases from one and half times applicable tariff for six months to two times applicable tariff for twelve months.

20.2 We are of the view that merely because the GEB continued as distribution licensee till 31.3.2005, it did not mean that the time limit of one year stipulated in clause (b) of Section 172 of the Electricity Act, 2003 containing transitional provisions can be treated as extended beyond the period of one year from the appointed date (i.e. beyond 10.12.2004).

In view of the second part of clause (b) of Section 172 [quoted in para 19.2 hereinabove], for

the period from 10.12.2004 onwards, the licenses in favour of GEB and AEC were deemed to be licenses under the Electricity Act, 2003 and all provisions of the new Act accordingly apply to such licenses. Section 174 of the Act gives overriding effect to the provisions of the Electricity Act, 2003 in the following terms :-

> “174. Act to have overriding effect .- Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or if any instrument having effect by virtue of any law other than this Act.”

Section 173 refers to the Consumer Protection Act, 1986, the Atomic Energy Act, 1962 and Railways Act, 1989.

20.3 In view of the provisions of Sections 45, 50 and 62 of the Act, till 7th June 2005 there was no express power conferred on the State Commission to permit the licensee to recover charges in theft cases. Once we have taken the view that Section 126 imposing liability for electricity charges at the rate of one and half times the tariff applies in case of unauthorised use of electricity even in absence of any mens rea, it would be absurd to hold that when theft of electricity involving mens rea takes places, the consumer would not be liable to pay even the charges at one and half times the applicable tariff for a maximum period of six months (in case of

industrial/commercial consumers), merely because Section 50 does not provide for assessment in theft cases. Even proceeding on the basis that the Act did not in terms confer on the licensee the power of assessment in theft cases till 7th June 2005, we would invoke the following principles enunciated by the Apex Court in **M/s. Unique Butyle Tube Industries Pvt. Ltd. vs. U.P. Financial Corporation**, **AIR 2003 SC 2103 = (2003) 2 SCC 455 (**Para 14) :-

> "14. Two principles of construction – one relating to casus omissus and the other in regard to reading the statute as a whole – appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J., in Artemiou v. Procopiou (1966 (1) QB 878), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a

rational construction. (Per Lord Reid in Luke v. I.R.C. (1966 AC 557)."

(emphasis supplied)

Applying the above principles, we hold that the consumers who were found by the licensee to have been prima-facie found involved in theft were liable to be assessed for electricity charges at one and half times applicable tariff for maximum six months in case of industrial consumers. At the same time, during this period, (where the theft was detected between 10th December 2004 and 30th March 2005), since the contention of the licensees that they can fall back on the Conditions of Supply to recover electricity charges in theft cases at two times the applicable tariff is already rejected in the preceding sub-para, the licensee could not have collected the amount at any rate higher than one and half times the applicable tariff for a period longer than six months in case of industrial/commercial consumers.

20.4 Section 45 requires the licensee to recover electricity charges in accordance with the provisions of the Act and the Regulations (i.e. the Electricity (Supply) Code) to be made by the State Commission. For the period between 31.3.2005 and 13.12.2005 the Gujarat Electricity Regulatory Commission had framed the Electricity Supply Code with effect from 31.3.2005 and Regulation 7.6.5 provided that assessment in theft cases shall be made on the same

basis as provided in Regulation 7.2 which was one and half times the applicable tariff for a maximum period of six months in case of industrial/commercial consumers. In view of identical rate, the debate would be academic. Even so, the same objection regarding non availability of power with the State Commission to prescribe assessment in theft cases would be technically available for the period between 31st March and 7th June 2005. For the reasons already indicated in the preceding para (20.3), the assessment in theft cases could not be allowed to be nil or less than one and half times applicable tariff for maximum six months. Hence, in cases of theft detected during this period between 31st March 2005 and 13th December 2005 also, the GEB and AEC were required to make assessment at the rate of one and half times the applicable tariff for maximum six months in case of industrial/commercial consumers.

20.5 During the entire period from 10th December 2004 to 13th December 2005, ordinarily the jurisdiction of civil Court would have been barred as per the discussion in paras 15 to 17 of this judgment, but taking the view that the remedy of the aggrieved party would be before the Special Court would expose the party to determination of civil liability by the Special Court under Section 154(5) at two times the applicable tariff for a maximum period of 12 months. Therefore, during this period it cannot be said that the aggrieved party could be expected to avail a remedy which would expose him to

harsher consequences. Similarly the consumers falling in this category will not be in a position to approach the appellate committee under Section 127 in view of our holding that assessment in theft cases is not covered by Section 126 of the Act and in view of the provisions of the Government notification dated 1.3.2005 (containing the guidelines for admitting and hearing of the appeals under Section 127 of the Electricity Act, 2003) specifically excluding theft cases from the purview of appeals. Hence, aggrieved parties falling in this category cannot be prevented from moving Civil Court.

CONCLUSIONS

21. To sum up then, our conclusions are as under:-

(i) The Electricity Act, 2003 (except Section 121) was brought into force by the Central Government on 10th June 2003, but in the State of Gujarat, its provisions came to be applied with effect from 10th December 2003.

[Para 19.1]

(ii) Although the terms of license issued in favour of the AEC and the GEB under the Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 and the Conditions of Supply and Miscellaneous Charges framed by the said licensees under the said Acts

continued to be operative till 9.12.2004, thereafter with effect from 10.12.2004, the distribution licenses in favour of those licensees continue to operate subject to their being in accordance with the provisions of the Electricity Act, 2003.

{Paras 19.3 and 20.2]

(iii) Challenge to the legality of the Central Government order dated 8th June 2005 removing difficulties with reference to the powers of the State Electricity Regulatory Commission under Section 50 of the Act and to the subsequent amendment dated 14th December 2005 to Regulation (Section) 7.6.5 of the Gujarat State Electricity Supply Code is turned down.

[Para 14]

(iv) The Electricity Act, 2003 read with the Central Government order dated 8th June 2005 and the State Electricity Supply Code framed under Section 50 of the Act as amended with effect from 14th December 2005 and the Statutory Regulations framed under the other provisions of the Act constitute a complete self-contained code in respect of criminal as well as civil liability in cases of theft of electricity and also in respect of the civil liability for unauthorised use of electricity. {para 16]

(v) Assessment to be made by the distribution licensee in theft cases is not governed by the provisions of Section 126 of the Act, but is governed by the provisions of Section 50 read with Regulation (Section) 7.6.5 of the Gujarat State Electricity Supply Code, 2005 as framed by the Gujarat Electricity Regulatory Commission and amended with effect from 14th December 2005. {paras 9 and 12]

(vi) Against such assessment, remedy of appeal under Section 127 of the Act is not available to the aggrieved party, but its remedy will be only before the Special Court constituted under Section 153 of the Act which will exercise its jurisdiction in accordance with the provisions of sub-sections (5) and (6) of Section 154 of the Act. [Para 9]

(vii) Although there is no specific provision in Section 145 of the Act for exclusion of jurisdiction of Civil Court to entertain any proceeding in respect of any matter which the Special Court is empowered by or under the Act to determine, we are of the view that any dispute about civil liability in theft cases is impliedly excluded from the jurisdiction of Civil Court.

[Paras 15 to 17]

The aforesaid principles are applicable to all cases wherein theft is detected on or after 14th December 2005.

22. Apart from the aforesaid legal position prevailing now, the question referred to us about the interpretation of the provisions of Sections 50, 126, 127, 135 and 154 of the Act will also have to be answered with reference to the following periods :

I Period from 10th December 2003 to 9th December 2004

II-A Period from 10th December 2004 to 31st March 2005

II-B Period from 31st March 2005 to 13th December 2005

III Period from 14th December 2005 onwards

I Period from 10th December 2003 to 9th December 2004 :

Where theft of electricity was detected prior to 10th December 2004, assessment of charges by the licensee was governed by the terms of “Conditions of supply and miscellaneous Charges for Supply of

Electrical Energy" framed by the Gujarat Electricity Board or the Ahmedabad Electricity Co. Ltd., as the case may be. Appeal against the order of assessment in such cases lies before the Appellate Committee constituted under the aforesaid Conditions of Supply. The jurisdiction of Civil Court to entertain suits against the orders of the Appellate Committee is not barred, but while deciding applications for interim injunction, Civil Court will have to consider the principles laid down by a Division Bench of this Court in Kiran Industries vs. GEB, 1995 (2) GLR 1158.

[Para 19]

II-A Period from 10th December 2004 to 31st March 2005 :

In cases of theft detected between 10th December 2004 and 30th March 2005, assessment of charges by the licensee shall not exceed one-and-half times the applicable tariff and the period of such bill shall not exceed six months (in case of industries) and three months (in case of domestic and agricultural consumers). In all such cases, jurisdiction of Civil Court will not be barred because the remedy of moving the Special Court under Section 154(5) of the new Act would expose the consumer to higher

liability. [Paras 20.3 & 20.5]

II-B Period from 31st March 2005 to 13th December 2005 :

In cases of theft detected between 31st March 2005 and 13th December 2005, assessment of charges by the licensee has to be made in accordance with the provisions of the State Electricity Supply Code (particularly Regulation 7.6.5) framed by the Gujarat State Electricity Regulatory Commission under Section 50 of the Act, which was in force till 13th December 2005. The said Regulation 7.6.5 read with Regulation 7.2 of the Code provided for the same rate and the same maximum period for computing charges in theft cases.

In cases of theft during this period also, also, civil suit will not be barred because the remedy of moving the Special Court under Section 154(5) of the new Act would expose the consumer to higher liability than the liability imposed under the Gujarat State Electricity Supply Code. [Paras 20.4 & 20.5]

III The period from 14th December 2005 onwards :

In cases of theft detected from 14th December 2005 onwards, assessment by the licensee will be made as per the provisions contained in Regulation 7.6.5 of the State Electricity Supply Code as amended with effect from 14th December 2005. In such cases, the aggrieved party will have the remedy of moving the Special Court constituted under Section 153 of the Act exercising powers under Section 154(5) of the Act, irrespective of the fact whether the distribution licensee has filed any criminal case against the consumer. In such cases, the jurisdiction of Civil Court will be impliedly barred. [Paras 9 and 15 to 17]

O R D E R S

23. In the result, we dispose of these matters in terms of the orders that follow, on the basis of the date of detection of theft by the concerned licensee in each case, as indicated in the charts produced by the learned Advocates for the respective licensees.

24. Cases against AEC

24.1 Letters Patent Appeal Nos. 471 and 513 of 2005 and 2634 of 2004 filed by the Torrent Power AEC Ltd. (hereinafter referred to as “the AEC”)against the judgment dated 10.3.2005 of the learned Single Judge of this Court falling in Category I are allowed. The Special Civil Applications giving rise to the appeals are accordingly dismissed.

Special Civil Application Nos. 23514 of 2005 and 352 of 2006 falling in Category I are also dismissed.

24.2 Letters Patent Appeal No. 512 of 2005 of AEC in Special Civil Application No. 955 of 2005 falls in category II-A and, therefore, the AEC shall have to revise the bills in accordance with the principles laid down in this judgment. Since the respondent in the said appeal (original petitioner - Gayatri Intermediates Pvt. Ltd.) is not shown to have paid any amount whatsoever towards the disputed bill, no other order is required to be passed as electricity supply to the said party was already disconnected.

Similarly, Special Civil Application No. 12236 of 2005 against AEC falls in category II-B. During pendency of the petition, electricity supply was reconnected on the petitioner depositing Rs.60,000/- against the supplementary bill of Rs.81,429/-. This petition is accordingly required to be partly allowed with a direction to the AEC to make assessment of the electricity charges in case of

the petitioner (Lalitkumar Jagjivandas) on the basis of the principles laid down in this judgment. If the amount deposited by the petitioner is in excess of the amount payable as per this judgment, the excess amount shall be refunded to the petitioner by 15th May 2006. In case there is shortfall in the amount, the petitioner shall make good the shortfall on or before 30th May 2006.

24.3 Special Civil Application No. 260 of 2006 falling in Category III is dismissed.

25. Cases against GEB

In Special Civil Application Nos. 16104, 20825, 22731, 22755, 22962, 22965, 22989, 23039, 23677, 23836, 24258, and 24259 of 2005 against GEB, theft in these cases was detected between 31.3.2005 and 13.12.2005. All these cases, therefore, fall in category II-B. As per the GEB, in all these cases, GEB had issued bills calculating the amount at one-and-half times the tariff applicable for six months immediately preceding the date of detection of theft. Hence, apart from the declaration in terms of the conclusions, the petitioners in these petitions are not required to be granted any other relief.

26. General Directions & Clarification

26.1 In certain cases against AEC or GEB, under interim orders of the Court, the licensee was

directed to restore electricity supply upon deposit of a part of the disputed bill amounts. In cases where the supplementary bills disputed in these petitions are found to be in accordance with the principles laid down in this judgment, we direct the concerned petitioners to deposit the balance amounts in six equal monthly installments, commencing from 15th May, 2006. On failure of the concerned petitioners to make such deposits, the licensee will be at liberty to disconnect electricity supply.

26.2 In cases where the amount of supplementary bill revised in accordance with the principles laid down in this judgment is less than the amount deposited by the petitioner/s the excess amount so deposited shall be refunded to the petitioner/s by 15th May 2006.

26.3 We have not gone into the merits of the factual contentions, if any, raised in the appeals/petitions. Disposal of the appeals/petitions shall not come in the way of the petitioners availing of the alternative remedy available to them for raising those factual and other contentions before the appropriate forum as indicated in para 22 of this judgment.

27. Before parting with the matter, we would like to place on record our appreciation for the valuable assistance rendered by Mr. MJ Thakore, Sr. Advocate and learned Advocates Mr KB Pujara, Ms Lilu

Bhaya, Ms Mayaben Desai for Mr MD Pandya, and Mr PN Thakkar for the licencees and Mr Tushar Mehta and the other learned Advocates for the petitioners.

[M.S. SHAH, J.] [SHARAD D. DAVE, J.]

At this stage, Mr Tushar Mehta, learned counsel for the petitioners in some of the petitions prays for stay of operation of this judgment in order to have further recourse in accordance with law.

The learned counsel for the GEB opposes the request and submits that in the cases represented by Mr Tushar Mehta theft was detected between 31st March and 13th December 2005 and that the GEB had issued supplementary bills at the rate of one and half times the applicable tariff for a period not exceeding six months and that even if the petitioners' contentions were accepted, the petitioners could not have been granted any further relief.

In the facts and circumstances of the case, we are not inclined to grant the stay as prayed for. The request is, therefore, rejected.

(M.S. SHAH, J.)

(SHARAD D DAVE, J.)

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